IN THE COURT OF APPEALS OF THE STATE OF ALASKA

DANNY E. CONWAY, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-11893 Trial Court No. 3PA-12-2000 CR MEMORANDUM OPINION No. 6362 — July 20, 2016

Appeal from the Superior Court, Third Judicial District, Palmer, Gregory Heath, Judge.

Appearances: Hanley R. Robinson, under contract with the Public Defender Agency, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant. Melissa J. Wininger-Howard, Assistant District Attorney, Palmer, and Craig W. Richards, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, and Allard, Judge.

Judge MANNHEIMER.

Danny E. Conway appeals his conviction for felony driving under the influence, AS 28.35.030(n), as well as the 5-year sentence he received for this crime.

Conway's first argument is that the evidence presented at his trial was legally insufficient to establish his guilt. More specifically, Conway argues that even

though the State may have proved that he was under the influence, the evidence was insufficient to establish that he was driving.

The vehicle in question was a Honda off-road vehicle. The state trooper who arrested Conway did not actually observe him driving this vehicle. Rather, when the trooper first saw Conway, Conway was sitting atop the vehicle, which was stopped near the edge of the roadway, near the intersection of Vine Road and the Parks Highway, outside of Wasilla. Conway then got off the vehicle and made his way on foot down the ATV path, helmet in hand. He had the ignition key to the off-road vehicle in his pocket. The vehicle was out of gas.

Viewing this evidence (and the reasonable inferences to be drawn from it) in the light most favorable to the jury's verdict,[1] fair-minded jurors could conclude that the government had proved (beyond a reasonable doubt) that Conway was the one who drove the off-road vehicle to the spot where the trooper found him. The evidence was therefore legally sufficient to support Conway's conviction.

(Conway also argues that if a vehicle is out of gas, it is no longer "operable" for purposes of our DUI laws. We have rejected this argument in several analogous cases,[2] and we reject it in Conway's case.)

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[1] *See*, *e.g.*, *George v. State*, 362 P.3d 1026, 1030 (Alaska 2015).

[2] *See Blanche v. Anchorage*, unpublished, 1998 WL106156, *1 (Alaska App. 1998) (concluding that a vehicle was still "operable" for purposes of the DUI laws even though it was out of gas and its battery was drained to the point where it could not be started); *Axford v. State*, unpublished, 1992 WL 12153171, *3 (Alaska App. 1992) (holding that a vehicle was "operable" even though it was stuck in a snowbank, with its battery drained to the point where it could not be started). *See also Kingsley v. State*, 11 P.3d 1001, 1003-04 (Alaska App. 2000) (holding that a vehicle was still "operable" even though it was stuck in the snow to the point where it could not be moved without the assistance of towing equipment).

Finally, Conway challenges his sentence as excessive. Felony driving under the influence is a class C felony.[3] The maximum penalty for this offense is 5 years' imprisonment, and because Conway was a third felony offender for purposes of presumptive sentencing, he faced a presumptive sentencing range of 3 to 5 years.[4]

The sentencing judge found that Conway was a "worst offender" (as that phrase is defined in our sentencing cases),[5] and the judge imposed the maximum sentence: 5 years to serve.

On appeal, Conway argues that the sentencing judge was clearly mistaken when he concluded that Conway was a "worst offender".

The record shows that when Conway committed the offense in this case, he already had five prior convictions for DUI — three misdemeanor convictions, and two felony convictions (one from 2005, and another from 2010). As part of his sentence for the 2010 felony DUI, his driver's license was revoked for life.

The sentencing judge found that, although the facts of Conway's case were not aggravated, Conway's lengthy record of drunk driving offenses and probation violations was "unique". The judge also concluded that Conway was a particularly dangerous offender because he was a "binge drinker" who could not be controlled. (Conway corroborated the judge's conclusion when he told the pre-sentence investigator that he was a person who "works when I work" and "drinks when I drink".)

Based on these factors, the sentencing judge concluded that Conway was among the worst DUI offenders. Given the record in this case, we conclude that the

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[3] AS 28.35.030(n).

[4] AS 12.55.125(e)(3).

[5] *See, e.g., State v. Wortham*, 537 P.2d 1117, 1120 (Alaska 1975); *Napayonak v. State*, 793 P.2d 1059, 1062 (Alaska App. 1990).

judge was not clearly mistaken in reaching this conclusion, and we therefore uphold Conway's sentence of 5 years to serve.

Conclusion

The judgement of the superior court is AFFIRMED.